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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 Ashwin KHOBRAKAGE,

11 Plaintiff,

12 v.

13 COVIDIEN LP,

14 Defendant.

Case No.: 16-cv-0468-WQH-AGS

**ORDER DENYING WITHOUT  
PREJUDICE PLAINTIFF'S  
MOTIONS TO COMPEL AND ISSUE  
SUBPOENAS**

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16 On August 28, 2018, Plaintiff filed two discovery motions. ECF Nos. 79, 81. The  
17 time period for conducting discovery in this case ended on April 30, 2018. ECF Nos. 22-  
18 24. As such, Plaintiff's discovery motions are untimely. While there are certain  
19 circumstances under which a party may obtain permission to reopen discovery, Plaintiff  
20 has not addressed either standard or provided any facts justifying reopening discovery at  
21 this time. See Fed. R. Civ. P. 16; Fed. R. Civ. P. 56; see also ECF No. 72 n.1 (order by  
22 Judge Hayes advising Plaintiff that any request to reopen discovery must be filed by  
23 motion).

24 Once a Rule 16 scheduling order is issued, dates set forth therein may be modified  
25 only "for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The Rule  
26 16 good cause standard focuses on the "reasonable diligence" of the moving party. Noyes  
27 v. Kelly Servs., 488 F.3d 1163, 1174 n.6 (9th Cir. 2007); Coleman v. Quaker Oats Co.,  
28 232 F.3d 1271, 1294-95 (9th Cir. 2000) (stating Rule 16(b) scheduling order may be

1 modified for “good cause” based primarily on diligence of moving party). Essentially, “the  
2 focus of the inquiry is upon the moving party’s reasons for seeking modification.” Johnson  
3 v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). However, a court also  
4 may consider the “existence or degree of prejudice to the party opposing the modification  
5 . . . .” Id.

6 Rule 56(d) permits a court to defer or deny a motion for summary judgment or to  
7 allow a party to conduct additional discovery “[i]f a nonmovant shows by affidavit or  
8 declaration that, for specified reasons, it cannot present facts essential to justify its  
9 opposition.” Fed. R. Civ. P. 56(d). “References in memoranda and declarations to a need  
10 for discovery do not qualify as motions under Rule 56[d].<sup>1</sup>” Morgan v. Schmidt, 119 F.3d  
11 6 (9th Cir. 1997) (noting that “[r]eferences in memoranda and declarations to a need for  
12 discovery do not qualify as motions under Rule 56(f)” and finding that “[b]ecause Morgan  
13 did not comply with the requirements of Rule 56(f), the district court did not abuse its  
14 discretion by granting the CHP Officer's summary judgment motion” (citing Brae Transp.,  
15 Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986))); see also Suhovy v. Sara  
16 Lee Corp., No. 1:12-CV-01889-LJO-GSA, 2014 WL 1400824, at \*2 (E.D. Cal. Apr. 10,  
17 2014) (same). Indeed, a “[f]ailure to comply with the requirements of Rule 56(f) is a proper  
18 ground for denying discovery and proceeding to summary judgment.” Suhovy, 2014 WL  
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21 <sup>1</sup> The provisions of subsection (f) of Rule 56 became current subsection (d) without  
22 substantial change during the 2010 Amendments of Rule 56. See Roosevelt Irrigation Dist.  
23 v. Salt River Project Agric. Improvement & Power Dist., No. 2:10-CV-290-DAE (BGM),  
24 2016 WL 3613278, at \*1 n.1 (D. Ariz. Feb. 22, 2016) (“Rule 56(d) was, until recently,  
25 Rule 56(f). While the number of the rule has been altered, the spirit of the rule remains  
26 unchanged.” (citing Michelman v. Lincoln Nat’l Life Ins. Co., 685 F.3d 887, 899 n. 7 (9th  
27 Cir. 2012) (“[F]ormer Rule 56(f) . . . is substantially the same as current Rule 56(d).”))).  
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1 1400824, at \*2 (finding that counsel's declaration as to the need for further discovery did  
2 not satisfy the requirements of 56(d) which requires litigants to submit affidavits setting  
3 forth the particular facts expected from further discovery and that the failure "alone serves  
4 as sufficient basis for the Court to deny [plaintiff's] request for a continuance" (quoting  
5 Brae Transp., Inc., 790 F.2d at 1443)). In addition, "[f]ailing to diligently pursue discovery  
6 ... is sufficient reason to deny further discovery." Garza v. Chavez, No. LA CV 10-07658-  
7 VBF-MAN, 2014 WL 3572148, at \*2-3 (C.D. Cal. July 18, 2014) (finding that pro se  
8 plaintiff's request to defer ruling on summary judgment motion so that he could conduct  
9 additional discovery that was made two days after filing his opposition brief, to be too late  
10 and noting that "the proper course of action was to file a much earlier request to push back  
11 the deadlines and defer ruling . . . pursuant to Fed. R. Civ. P. 56(d)" (quoting Long v.  
12 Playboy Enters. Int'l, Inc., 565 F. App'x 646, 648 (9th Cir. 2014)) (citing Rector v. N.Y.  
13 Bank of Mellon, No. LA CV 12-08587-VBF, 2014 WL 631955, at \*5 (C.D. Cal. Feb. 14,  
14 2014)).

15 Because Plaintiff has not moved to reopen discovery under either standard and  
16 because Plaintiff has not provided facts satisfying either standard, the Court **DENIES**  
17 Plaintiff's motions to compel discovery and for issuance of subpoenas. This denial is made  
18 without prejudice. If Plaintiff wants to file a motion to reopen discovery, he must do so by  
19 September 24, 2018. If Plaintiff files a motion to reopen discovery, Defendant's opposition  
20 must be filed by October 9, 2018.

21 **IT IS SO ORDERED.**

22  
23 Dated: 9/11/2018

24   
25 Hon. Barbara L. Major  
26 United States Magistrate Judge  
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